

PNSB Acmar Sdn Bhd v Palanisamy a/l Kuppusamy

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22–316 OF 2003
CHAN JIT LI JC
15 MAY 2017

Civil Procedure — Appeal — Appeal against decision of registrar — Registrar found respondent failed to prove his claim for damages but went on to order appellant to pay respondent ‘nominal’ damages of an extraordinary sum of RM800,000 — Appeal remitted from Court of Appeal to High Court for rehearing — Whether court estopped from evaluating evidence adduced at assessment of registrar and from considering any other issues — Whether appeal should not be confined only to issue of what constituted damages

This was an appeal against the order of the registrar awarding the respondent damages. The applicant was the developer of a housing scheme. On 14 November 1994, the respondent executed a sale and purchase agreement to purchase from the appellant a double storey house (‘bungalow’) to be erected on a piece of land for a sum of RM568,000. After the respondent took possession of the bungalow, the respondent complained of defects in the structure and alleged that as a result of the defects, he suffered loss chiefly in remedial works. The respondent sued the appellant for damages. At the end of the hearing, the judge entered judgment in his favour and assessment of damages took place before the learned registrar. The learned registrar found that the respondent failed to prove his claim for damages but, nevertheless went on to order the appellant to pay the respondent ‘nominal’ damages of an extraordinary sum of RM800,000. The appellant then filed an appeal to the judge in chambers contending that the learned registrar erred in awarding a sum of RM800,000 as nominal damages. The judge allowed the appeal and reduced the award of RM800,000 to RM10,000. In turn, the respondent appealed against the order of the appeal judge. The Court of Appeal ordered that the appeal be remitted to the High Court for a rehearing. Hence, the present appeal. The appellant submitted that the issue in the present appeal was whether nominal damages could be set at RM800,000. The appellant contended that the sole issue in this appeal and as it was a legal issue, the court was estopped from evaluating evidence that had been adduced at the assessment of the registrar and from considering any other issues. The respondent submitted that the hearing of this appeal should not be confined only to the issue of what constituted damages and that the court should also consider whether or not the learned registrar erred in concluding that the respondent failed to prove his claim for damages.

A Held:

- (1) In the rehearing, the High Court was required to consider all the merits arising in the appeal. Only this interpretation could give efficacy to the judgment of the Court of Appeal. If the judgment was interpreted otherwise, that would amount to a re-litigation of the same issue that had been dealt with by the earlier judge. Therefore, the respondent's submission as to the conduct of the rehearing was correct (see paras 13–14).
- (2) A judge hearing an appeal to a judge in chambers from a decision of the registrar is as a matter of law rehearing the application and is entitled to treat the matter as though it comes before him for the first time; and that he is not fettered by any previous finding, ruling or order of the registrar's from whose decision the appeal originates. In the context of the said matter, it was within the court's powers to consider the issue of whether the learned registrar was right in concluding that the respondent had failed to discharge his burden of proving his claim for damages even though the respondent failed to file an appeal (see para 19).
- (3) The decision of the learned registrar was inherently flawed. An award is intrinsically intertwined with the damage suffered. If her finding was that the respondent had failed to prove the damage suffered, she had no basis to make an award of RM800,000 (see para 20).

[Bahasa Malaysia summary]

- Ini adalah rayuan terhadap perintah pendaftar dalam mengawardkan responden dengan ganti rugi. Pemohon adalah pemaju skim perumahan. Pada 14 November 1994, responden melaksanakan perjanjian jual beli untuk membeli daripada perayu rumah dua tingkat ('banglo') untuk dibina di atas sekeping tanah bagi sejumlah RM568,000. Selepas responden mengambil milikan banglo, responden mengadu kecacatan dalam struktur dan mendakwa bahawa akibat kecacatan tersebut, dia mengalami kerugian terutamanya dalam kerja-kerja pembaikan. Responden menyaman perayu bagi ganti rugi. Pada akhir pendengaran, hakim memasukkan penghakiman memihak kepada responden dan penaksiran ganti rugi mengambil tempat di hadapan pendaftar yang bijaksana. Pendaftar yang bijaksana mendapati bahawa responden gagal untuk membuktikan tuntutananya bagi ganti rugi tetapi, walau bagaimanapun terus memerintah perayu untuk membayar kepada responden ganti rugi 'nominal' daripada jumlah yang luar masa RM800,000. Perayu kemudiannya memfailkan rayuan kepada hakim dalam kamar dengan berhujah bahawa pendaftar yang bijaksana tersilap dalam mengawardkan jumlah sebanyak RM800,000 sebagai ganti rugi nominal. Hakim membenarkan rayuan dan mengurangkan award sebanyak RM800,000 kepada RM10,000. Responden seterusnya merayu terhadap perintah hakim rayuan. Mahkamah Rayuan memerintahkan bahawa rayuan diremit semula ke Mahkamah Tinggi untuk

pendengaran semula. Maka, rayuan ini. Perayu berhujah bahawa isu di dalam rayuan ini adalah sama ada ganti rugi nominal boleh ditetapkan pada RM800,000. Perayu berhujah bahawa satu-satunya isu dalam rayuan ini dan memandangkan ia adalah isu undang-undang, mahkamah diestop daripada menilai keterangan yang telah dikemukakan semasa penaksiran oleh pendaftar dan daripada mempertimbangkan apa-apa isu lain. Responden berhujah bahawa pendengaran rayuan ini tidak patut terbatas hanya kepada isu mengenai apa yang membentuk ganti rugi dan bahawa mahkamah patut juga mempertimbangkan sama ada atau tidak pendaftar yang bijaksana tersilap dalam memutuskan bahawa responden gagal untuk membuktikan tuntutananya untuk ganti rugi.

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Diputuskan:

- (1) Dalam pendengaran semula, Mahkamah Tinggi dikehendaki untuk mempertimbangkan kesemua merit yang berbangkit di dalam rayuan tersebut. Hanya tafsiran ini boleh memberi keberkesanan kepada penghakiman Mahkamah Rayuan. Jika penghakiman ditafsirkan sebaliknya, ia akan merupakan litigasi semula isu yang sama yang telah didengar oleh hakim terdahulu. Oleh itu, hujahan responden terhadap tindakan pendengaran semula adalah betul (lihat perenggan 13–14).
- (2) Hakim yang mendengar rayuan kepada hakim dalam kamar daripada keputusan pendaftar adalah perkara undang-undang mendengar semula permohonan dan berhak untuk menganggap perkara tersebut seperti ia berbangkit di hadapannya untuk pertama kalinya; dan bahawa dia tidak dibelenggu oleh mana-mana dapatan terdahulu, keputusan atau perintah pendaftar daripada keputusan mana rayuan tersebut berasal. Dalam konteks perkara tersebut, ia adalah dalam kuasa mahkamah untuk mempertimbangkan isu sama ada pendaftar yang bijaksana adalah betul dalam memutuskan bahawa responden telah gagal untuk melepaskan bebannya membuktikan tuntutananya bagi ganti rugi walaupun responden gagal untuk memfailkan rayuan (lihat perenggan 19).
- (3) Keputusan pendaftar yang bijaksana sememangnya cacat. Award adalah secara intrinsik berjaln dengan kerugian yang dialami. Jika dapatannya adalah bahawa responden telah gagal untuk membuktikan ganti rugi yang dialami, beliau tidak mempunyai asas untuk membuat award sebanyak RM800,000 (lihat perenggan 20).]

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Notes

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For cases on appeal against decision of registrar, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 882–902.

A Cases referred to

John Andrew Malthouse v Cyril Steven & Ors [2015] 7 MLJ 548, HC (distd)
Seloga Jaya Sdn Bhd v Pembinaan Keng Ting (Sabah) Sdn Bhd [1994] 2 MLJ 97; [1994] 2 CLJ 716, SC (refd)

B *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30; [1996] 1 CLJ 241, FC (refd)
Yong Teng Hing (t/a Hong Kong Trading Co) & Anor v Walton International Ltd [2011] 5 MLJ 629, FC (refd)

C *Ravindran a/l Neeko @ Veloo (Hakem Arabi & Assoc) for the plaintiff.*
Kanarasan Ghandinesen (Gandhi) for the defendant.

Chan Jit Li JC:

D [1] This is an appeal against the order of the registrar awarding the plaintiff damages. As this case had been subjected to more than one appeal from both parties, for convenience the parties will be referred to as ‘the plaintiff’ and ‘the defendant’.

E [2] The factual background leading to the appeal before me is as follows. The defendant was the developer of a housing scheme advertised as ‘Bandar Baru Klang, the 21st Century Township’. On 14 November 1994, the plaintiff executed a sale and purchase agreement (‘SPA’) to purchase from the defendant a double storey house (‘bungalow’) to be erected on a piece of land identified as Lot No PT No 21192 HS (M) for a sum of RM568,000.

F [3] There is no dispute that the plaintiff did pay up the whole sum and the defendant did deliver vacant possession of the bungalow.

G [4] After taking possession, the plaintiff complained of defects in the structure alleging that as a result of the defects, he suffered loss chiefly in remedial works. He sued the defendant for damages and at the end of the hearing, the learned trial judge entered judgment in his favour granting the following prayers in para 29 of the statement of claim:

- H** (1) ...
- (2) Gantirugi am untuk ditaksirkan;
- (3) Faedah gantirugi am yang ditetapkan pada kadar 8% setahun bermula dari tarikh penghakiman sehingga ke tarikh penyelesaian penuh;
- I** (4) Kos.
- (5) ...

[5] The assessment of damages took place before the learned registrar. The

plaintiff called three witnesses comprising of the plaintiff himself, an engineer and a quantity surveyor, whilst the defendant called its Assistant General Manager of the Regulatory Affairs Unit. Although there is no written grounds from the learned registrar, it is common grounds between both parties that at the end of the assessment hearing, the learned registrar arrived at the following finding. She found that the plaintiff failed to prove his claim for damages but, nevertheless, went on to order the defendant to pay the plaintiff 'nominal' damages of an extraordinary sum of RM800,000.

[6] The plaintiff did not file any appeal despite the registrar's findings that he had failed to prove the damages he purportedly suffered. His omission is understandable as regardless of the findings, he was awarded the generous sum of RM800,000 for just 'nominal' damages.

[7] The defendant, on the other hand, filed an appeal to the judge in chambers contending that the learned registrar erred in awarding a sum of RM800,000 as nominal damages.

[8] After the hearing, the learned judge allowed the appeal and reduced the award of RM800,000 to a mere RM10,000. (The parties, however, did not furnish me with a copy of the grounds of this judgment.)

[9] The plaintiff was naturally unhappy and appealed against the order of the appeal judge. After hearing the parties, the Court of Appeal ordered that the appeal be remitted to the High Court for a rehearing. Hence, the present appeal before me.

[10] Before me, Mr Ravindran a/l Neeko @ Veloo ('Mr Ravindran'), learned counsel for the defendant, submits that since the plaintiff did not file an appeal against the decision of the registrar, therefore, he is bound by the whole of the decision of the registrar. He further submits that there is only one appeal before this court and that is the defendant's appeal. This appeal, however, is not against the whole of the registrar's decision but only in part. He goes further by crystallising the issue as follows: whether nominal damages can be set at RM800,000? He contends that as that is the sole issue in this appeal and as it is a legal issue, this court is estopped from evaluating the evidence that had been adduced at the assessment before the Registrar. Apart from that, the Court is also estopped from considering any other issues. He cites *John Andrew Malthouse v Cyril Steven & Ors* [2015] 7 MLJ 548 in support of his contention.

[11] Mr Kanarasan Ghandinesen, learned counsel for the plaintiff, concedes that the learned registrar erred in awarding RM800,000 as nominal damages. However, it is his submission that the hearing of this appeal should not be confined only to the issue of what constitutes nominal damages. In this appeal,

A the court should also consider whether or not the learned registrar erred in concluding that the plaintiff had failed to prove his claim for damages. Mr Kanarasan contends that it was for this very reason that the Court of Appeal directed a rehearing of the appeal as the earlier judge did not do so.

B [12] There is no written grounds from the Court of Appeal for the judgment which appears as follows:

DALAM MAHKAMAH RAYUAN MALAYSIA
(BIDANG KUASA RAYUAN SIVIL)

RAYUAN SIVIL NO: B-02(IM)-2566-11/2013

ANTARA

PALANISAMY A/L KUPPUSAMY
(NO. KP: 541113-10-5151)

—PERAYU/
PLAINTIFF

DAN

PNSB ACMAR SDN BHD
(No. Syarikat : 246708-M)

—RESPONDEN/
DEFENDAN

(Dalam Perkara Mengenai Guaman Sivil No. 22-316-2003 dalam Mahkamah
Tinggi Malaysia di Shah Alam)

ANTARA

PNSB ACMAR SDN BHD
(No. Syarikat : 246708-M)

—Perayu/
Defendan

DAN

PALANISAMY A/L KUPPUSAMY
(NO. KP: 541113-10-5151)

—Responden/
Plaintif

KORAM

MOHAMAD ARIFF BIN MD. YUSOF, HMR

MOHD. ZAWAWI BIN SALLEH, HMR

IDRUS BIN HARUN, HMR

A

PADA 29 SEPTEMBER 2014

DALAM MAHKAMAH TERBUKA

B

PERINTAH

RAYUAN INI ditetapkan untuk pendengaran pada hari ini dalam kehadiran Kanarasan Ghandinesen peguam bagi pihak Perayu dan Ravi Nekoo (R. Hanita) bersama peguam bagi pihak Responden DAN SETELAH MEMBACA Rekod Rayuan dan kesemuanya yang difailkan di sini DAN SETELAH MENDENGAR hujahan pihak-pihak yang hadir MAKA ADALAH DENGAN INI DIPERINTAHKAN bahawa:

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(a) Rayuan dibenarkan sebahagian dimana tindakan ini diremit ke Mahkamah Tinggi untuk di dengar semula *berdasarkan merit sepenuhnya rayuan taksiran gantirugi* dari keputusan Penolong Kanan Pendaftar bertarikh 14.03.2013.

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(b) Kos dalam kausa ; dan

(c) Deposit dikembalikan kepada Perayu.

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DIBERI di bawah tandatangan saya dan Meterai Mahkamah pada 29 September 2014.

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TIMBALAN PENDAFTAR
MAHKAMAH RAYUAN MALAYSIA
PUTRAJAYA

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(Emphasis added.)

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[13] The direction of the Court of Appeal is clear and unequivocal. In the rehearing the High Court is required to consider all the merits arising in the appeal. Only this interpretation can give efficacy to the judgment of the Court of Appeal. If the judgment was interpreted otherwise, that is to say, as what Mr

A Ravindran submits, it would mean a re-litigation of the same issue as his argument contained in paragraph above had been dealt with by the earlier judge.

B [14] I am, therefore, of the view that Mr Kanarasan's submission as to the conduct of this rehearing is correct.

C [15] In *John Andrew*, the authority relied by Mr Ravindran, the High Court sat to hear an appeal against the registrar's award of damages in an accident claim. Amongst other issues in the appeal was the award of RM500,000 for pain and suffering. The appellant-defendant had submitted that the learned registrar erred in making the award based on 2011 precedents. He had contended that the learned registrar should have considered precedents from the date of service of the writ to the date of judgment (8 March 2001). The respondent-plaintiff had then sought an increased award RM1.2m. The learned judge had then ruled that the court should be concerned with matters which are not the subject of appeal.

E [16] The facts in *John Andrew* can be distinguished. Although the issues raised related to the same item of claim ie pain and suffering, the issues taken up by the parties were distinct and separate. The subject matter raised by both parties in the instant appeal, although against that very one order of the learned registrar, are intertwined and interdependent. The circumstances necessitates the consideration of both issues (which I shall deal with in para 20).

F [17] It is trite law the hearing of an appeal from the subordinate courts is distinct from the hearing of an appeal against the order of a registrar (see *Yong Teng Hing (t/a Hong Kong Trading Co) & Anor v Walton International Ltd* [2011] 5 MLJ 629). In *Tuan Haji Ahmed Abdul Rahman v Arab-Malaysian Finance Bhd* [1996] 1 MLJ 30; [1996] 1 CLJ 241, Edgar Joseph Jr FCJ (as he then was) delivering the judgment of the Federal Court held (at p 36 (MLJ); p 241 (CLJ)) that:

H With respect, in appeals to a judge in chambers from the decision of a Registrar of the High Court, the judge is not exercising appellate jurisdiction in the same sense as when he hears appeals from judgments, decisions or orders of the subordinate courts. Such appeals from decisions of the registrar are by way of an actual re-hearing and the judge treats the matter as though it comes before him for the first time. *The judge is therefore not confined to the points taken before the registrar so that the rule about new points being not generally open to an appellant to take on appeal does not apply.*

I In support, we would refer to the following passage in the judgment of Payne J in *Blundell v Rimmer* [1971] 1 All ER 1072 (at p 1076):

I understand that the arguments before me ranged over a wider ground than

those advanced by the parties' solicitors to the district registrar, and it was contended by Counsel for the plaintiff that I was fettered by the proceedings before the district registrar and confined to the arguments which were presented to him; that no point could be raised before me which was not raised below.

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It is, I think, clear on authority that the appeal from the district registrar is a rehearing of the application and I am entitled to treat the matter as though it comes before me for the first time; moreover, that I am not fettered by the previous exercise of the district registrar's discretion, although I should, of course, give to it the weight which it deserves. (Emphasis added.)

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[18] In *Seloga Jaya Sdn Bhd v Pembinaan Keng Ting (Sabah) Sdn Bhd* [1994] 2 MLJ 97; [1994] 2 CLJ 716 Edgar Joseph Jr SCJ (as he then was) in delivering the judgment of the Supreme Court held (at p 107 (MLJ); p 724 (CLJ)):

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The second point we should like to make is that the judge did mention, in passing — in our view quite correctly — that though the matter before him was in form an appeal, it did 'take the shape and style of rehearing ...'. However, in his approach to the questions for decision, he treated the appeal, in the fullest sense, as an appeal from a discretionary order made by the registrar. In other words, it looks very much as though the judge's approach was that he should not interfere with the registrar's exercise of discretion unless it was shown that the discretion had been exercised on a wrong principle or not at all, or that there had been a miscarriage of justice. In other words, as an appellate judge, he was not to exercise an independent discretion of his own, but had to defer to the registrar's exercise of his discretion and could not interfere with it merely on the ground that he would have exercised it differently. (See 37 *Halsbury's Laws*, 4th Ed, p 493 para 656). In adopting this approach, the judge was wrong, the appeal before him being from the registrar by way of an actual re-hearing.

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[19] The above judgments fortify my view that a judge hearing an appeal to a judge in chambers from a decision of the registrar is as a matter of law rehearing the application and is entitled to treat the matter as though it comes before him for the first time; and that he is not fettered by any previous finding, ruling or order of the registrar's from whose decision the appeal originates. Therefore, in the context of the matter that is now before me, I hold that it is within my powers to consider the issue of whether the learned registrar was right in concluding that the plaintiff had failed to discharge his burden of proving his claim for damages even though the plaintiff failed to file an appeal.

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[20] With respect, I find the decision of the learned registrar to be inherently flawed. An award is intrinsically intertwined with the damage suffered. If her finding was that the plaintiff had failed to prove the damage he suffered, it follows that she had no basis to make an award of RM800,000.

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[21] I also noted that under the SPA the plaintiff had only paid a sum of

- A** RM568,000. The RM568,000 was for both the building and the land on which the bungalow was built. Working on the assumption that the building was found to be wholly unfit for dwelling, this award of RM800,000 enriched the plaintiff by RM232,000 plus the value of the said land which I presume had been transferred to him. Prima facie this cannot be right. However, there is no
- B** evidence to allow me to make a variation of the quantum even if I were minded to. There is also the issue of the costs of reconstruction of RM1,506,500 which is far in excess of the contract price. Was the plaintiff substituting a better grade of raw materials in the reconstruction of the building? Or was the higher costs simply because of inflation?

- C** [22] I find that these issues, amongst others, were not addressed evidentially and this deprives me making a considered decision. Thus in the interests of justice, I directed that there be a reassessment of the damages to be conducted before me.

- D** *Order accordingly.*

Reported by Nisha Paran

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